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February 21, 2006

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Federal Election Commission
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AOR 2006-10

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FEDERAL ELECTION
COMMISSION
GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Mr. Norton:

We are writing on behalf of EchoStar Satellite LLC ("EchoStar"), pursuant to 2 U.S.C. § 437f, to seek an advisory opinion from the Federal Election Commission confirming that EchoStar may air public service announcements that feature Members of Congress, among other public figures, and the time periods in which EchoStar may air such public service announcements.

INTRODUCTION

EchoStar is a limited liability company that provides pay-TV satellite service nationwide via its Direct Broadcast Satellite ("DBS") system under the brand name "DISH Network." For tax purposes, EchoStar is classified under its ultimate parent, EchoStar Communications Corporation, a Nevada corporation. EchoStar plans to air a series of public service announcements nationwide ("PSAs") that will feature well-known Americans delivering messages that promote charitable causes, such as aid to victims of Hurricane Katrina, or awareness of important health issues such as breast cancer or heart disease.

EchoStar will produce, direct, and record the PSAs, and will have complete financial and creative control over each PSA, including its timing. EchoStar intends to ask prominent Americans, including Members of Congress, to appear in the PSAs and read the scripts provided by EchoStar. A sample script is attached as Exhibit A. Regardless of whether or not a particular PSA features a Member of Congress, the PSAs will not make reference to any pending official matter. They also will not contain campaign materials or express advocacy on behalf of a candidate, nor will they refer to any political party, election, campaign, or the solicitation of any contributions for a political campaign. In other words, EchoStar will observe

restrictions that the Commission has previously found relevant in finding that PSAs, because they were not run for the purpose of influencing an election, could be financed without regard to the financing and related requirements of the Federal Election Campaign Act of 1971, as amended (the "Act").¹

In addition to the content restrictions described above, EchoStar intends to place restrictions on the timing of each PSA. Specifically, consistent with the prohibitions on "electioneering communications," any PSA featuring a Member who is a candidate for reelection will not air in that Member's state (in the case of Senate candidates) or district (in the case of House candidates) within 30 days of the Member's primary or runoff election, as applicable, or within 60 days of the Member's general or runoff election, as applicable. EchoStar seeks the Commission's opinion on the question of whether PSAs produced and aired in accordance with these parameters for content and timing are permissible under the Act.

LEGAL DISCUSSION

In prior Advisory Opinions, the Commission has concluded that Members of Congress may appear in public service programming because such programming does not constitute in-kind contributions by television service providers. *See, e.g.,* Advisory Opinion 1994-15, 1992-5 and opinions cited therein. EchoStar's proposed PSAs featuring Members of Congress are permissible under such precedent, for they do not satisfy the Act's requirements for treatment as an in-kind contribution.

The Act prohibits corporate contributions to federal campaigns. 2 U.S.C. § 441b. The Act identifies three categories of spending which, when coordinated with a candidate, must be treated as an in-kind contribution to that candidate. *First*, "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" constitute a contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). To qualify as an "expenditure", spending must be undertaken "for the purpose of influencing" a federal election. *See* 2 U.S.C. § 431(9)(A). *Second*, the financing of "the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents" also constitutes an "expenditure" and an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(iii). *Third*, any disbursement for an electioneering communication that is coordinated with a

¹ The guidance EchoStar seeks herein from the Commission applies to the PSAs that feature Members of Congress.

candidate, a candidate's authorized committee, or their agents must be treated as a contribution to the candidate. *See* 2 U.S.C. §§ 434(f), 441a(a)(7)(C).

The Commission's "coordinated communication" regulations implement these statutory provisions by setting forth a three-prong test for determining whether a communication constitutes an in-kind contribution to a candidate. The first prong requires that the communication be paid for by a person other than the candidate, the candidate's authorized committee or any of their agents. *See* 11 C.F.R. § 109.21(a)(1). Next, the communication must include content that satisfies at least one of the Commission's four "content standards." *See* 11 C.F.R. § 109.21(a)(2) and (c). Finally, the candidate and the person paying for the communication must satisfy at least one of the Commission's six "conduct standards." *See* 11 C.F.R. § 109.21(a)(3) and (d)(1) through (6). A communication must satisfy all three prongs – payment, content and conduct – in order to be deemed a "coordinated communication" that must be treated as an in-kind contribution to a candidate. *See* 11 C.F.R. § 109.21(a) and (b).

(1) The first content standard implements the statutory requirement that any disbursement for an electioneering communication that is coordinated with a candidate, a candidate's authorized committee, or their agents be treated as a contribution to the candidate. *See* 2 U.S.C. §§ 434(f), 441a(a)(7)(C). In order to constitute an "electioneering communication," a communication's content, timing, location, and means of public distribution must satisfy certain requirements. The communication must refer to a clearly identified candidate; it must be "aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system;" and it must be disseminated within 60 days before a general, special or runoff election for the office sought by the candidate referenced in the communication, or within 30 days before a primary, preference, special or runoff election, or a caucus or convention, in which the candidate referenced is seeking the nomination of that political party. *See* 11 C.F.R. § 100.29(a)(1)-(3). In addition, in the case of a candidate for Senate or the House of Representatives, the communication must be targeted to the relevant electorate. *See* 11 C.F.R. 100.29(a)(3) and (b)(5).

EchoStar's proposed PSAs will not constitute an electioneering communication. As noted above, EchoStar will not air a PSA featuring a House Member in their district, or a Senator in their state, within 30 days of a primary or runoff election, or within 60 days of a general or runoff election, in which that Member is a candidate. As a result, none of the PSAs will trigger either the 30/60 day requirement or the targeting requirement for an electioneering communication.

(2) The second content standard implements the statutory requirements for republished campaign materials. 2 U.S.C. §441a(a)(7)(B)(iii). It encompasses any public communication "that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing," subject to certain exceptions. See 11 C.F.R. § 109.219(c)(2). A "public communication" is defined to include "a communication by means of any broadcast, cable or satellite communication." 11 C.F.R. § 100.26. EchoStar's PSAs will not meet this standard because none of the PSAs will contain any campaign materials.

(3) The third content standard implements the statutory requirements for coordinated "expenditures." See 2 U.S.C. § 441a(a)(7)(B)(i). As noted earlier, the Act requires that an "expenditure" be "for the purpose of influencing" a federal election. See 2 U.S.C. § 431(9)(A). A public communication "that expressly advocates the election or defeat of a clearly identified candidate for Federal office" meets this standard. 11 C.F.R. § 109.21(c)(3); see *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). No PSA will contain express advocacy, and therefore will not trigger this third content standard.

(4) The fourth content standard, also a measure to implement the limitations on coordinated expenditures, is defined as a public communication about which each of the following statements is true:

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.² 11 C.F.R. § 109.21(c)(4).

² Although there is possible ambiguity in section 109.21(c)(4)(iii)'s requirement that the public communication be directed "to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot," the Commission has clarified that the only jurisdiction that is relevant for a communication that refers to a clearly identified candidate is the candidate's jurisdiction. See *Final Rules and Explanation and Justification on Coordinated and Independent*

In *Shays v. FEC*, the D.C. Court of Appeals held that the 120-day rule set forth in section 109.21(c)(4) was "arbitrary and capricious under the APA," and it affirmed the district court's invalidation of the rule. See *Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005). The Court of Appeals concluded that "the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition. See *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856 ('[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' (internal quotation marks omitted))." *Id.* at 102.

As a result, the Commission is currently conducting a rulemaking to bring the rule into compliance with the APA. See *Notice of Proposed Rulemaking on Coordinated Communications*, 70 Fed. Reg. 73946 (Dec. 14, 2005). Among the issues under consideration is whether to replace section 109.21(c)(4) with a standard based on public communications "made for the purpose of influencing a federal election." *Id.* at 73952. In seeking comment on incorporating this statutory standard into the regulation, the Commission notes that this standard "would exclude from regulation some communications that are covered by current 11 C.F.R. 109.21(c)(4), i.e., communications that are made within 120 days of an election and that do refer to a political party or a clearly identified Federal candidate but that are not made for the purpose of influencing a Federal election." *Id.*

The Commission appears here to suggest that—regardless of effect or intent—any coordinated communication satisfying the three "prongs" of the rule in its current form will be deemed to have been made for the purpose of influencing a federal election. It is not clear how the Commission might have reached this conclusion. Nothing in the legislative history suggests a Congressional intent so indiscriminate, and nothing in the record of the agency, when considering the rule, supports a conclusion at variance with the statutory and constitutional conditions for exercising its rulemaking authority.

Central to the distinction between a coordinated and electioneering communication is precisely this feature of bright-line inflexibility: it is because the electioneering communication prohibition encompasses any communication within the 30 and 60 day time frames, regardless of purpose, that the Commission declined to adopt an exception for PSAs financed by 501(c)(3) charities otherwise prohibited by

Expenditures, 68 Fed. Reg. 421, 431 (Jan. 3, 2002). In this case, all PSAs will air via EchoStar's Direct Broadcast Satellite Service, which broadcasts to the entire United States simultaneously.

law from intervening in federal elections. See *Final Rules and Explanation and Justification on Electioneering Communications*, 70 Fed. Reg. 75713, 75714 (Dec. 21, 2005). By contrast, the "purpose" test is the threshold statutory requirement for concluding that a coordinated communication that does not constitute an electioneering communication (or the republication of campaign materials) is nonetheless an "in-kind" contribution to a candidate.

Commission precedent construing the "purpose" test as applied to PSAs establishes that, under specified criteria, a federal officeholder's participation in public service programming does not satisfy the statutory requirement for treating the communication as an-kind contribution. See, e.g., Advisory Opinion 1994-15, 1992-5 and opinions cited therein. Those opinions identify as among the relevant criteria the absence of express advocacy and the solicitation of contributions, while acknowledging that the absence of solicitations for contributions or express advocacy will not preclude a determination that an activity is campaign-related. Other relevant factors include whether the public service programming will contain any campaign or election-related references, including campaign materials, and whether the programming is otherwise devoid of campaign-related material or content. The Commission has also taken into account whether a series was controlled by a campaign, and whether the schedule and the duration of the series, or the selection of individual topics, would be made with reference to the timing of a candidate's nomination or election to office.

As stated earlier, the proposed PSAs will not contain express advocacy or campaign materials, nor will they refer to any political party, election, campaign, or the solicitation of any political contributions. EchoStar will restrict its airing of the PSAs to comply with whatever requirements the Commission deems necessary under the Act; otherwise, EchoStar plans to air the PSAs without reference to the timing of any candidate's nomination or election to office. EchoStar will exercise complete financial and creative control over the PSAs, and will not permit any campaign to be involved in its PSAs. The Members' role will be limited to reading from scripts that have been provided by EchoStar to encourage public support for charities that provide relief to victims of natural disasters, and other humanitarian causes. No campaign issues will be permitted as topics for any of the PSAs. Based on these restrictions, the proposed PSAs do not appear to fall within the Commission's "for the purpose of influencing" standard for public service programming.

However, because the Commission has acknowledged that section 109.21(c)(4) is broadly worded to potentially encompass communications that the statutory provision which it implements does not, EchoStar seeks confirmation that it correctly concludes that the proposed PSAs do not trigger the statutory requirement of being

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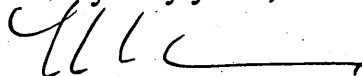
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"for the purpose of influencing" a federal election. Specifically, if the Commission concludes that the proposed PSAs are not for the purpose of influencing a federal election, EchoStar seeks confirmation that the Commission will not treat the proposed PSAs as in-kind contributions to any candidates.³

CONCLUSION

Based on EchoStar's proposed restrictions regarding content and timing for the proposed PSAs, there does not appear to be a basis for the PSAs to satisfy any of the statutory requirements for treating a coordinated communication as an in-kind contribution. In light of the current language in section 109.21(c)(4), however, EchoStar respectfully requests that the Commission confirm that the dissemination of the proposed PSAs would be permissible under the Act.

Very truly yours,



Robert F. Bauer
Caroline P. Goodson
Counsel to EchoStar Satellite LLC

cc: Chairman Michael E. Toner
Vice Chairman Robert D. Lenhard
Commissioner David M. Mason
Commissioner Hans A. von Spakovsky
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub

³ EchoStar acknowledges that this question of statutory and regulatory interpretation may be clarified in the Commission's rulemaking – if, for example, the "made for the purpose of influencing a federal election" standard is added as a fourth prong of section 109.21(c)(4).

EXHIBIT A

Sample PSA Script: Women and Heart Disease

Announcer: Hello, I'm [NAME]. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

Voice Over: This message brought to you by DISH Network.